

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1491

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit
Docket No. 76-2191

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AB5

UNITED STATES OF AMERICA,

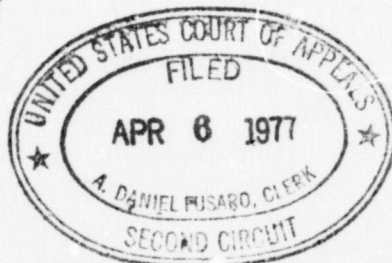
Appellee,

FRANK AMENDOLA,

Appellant.

On Appeal from a Judgment of the United States District
Court for the District of Connecticut.

LESLY BELLET OF COUNSEL,
FRANK AMENDOLA



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Appellant.

Docket No. 76-1491

REPLY BRIEF OF DEFENDANT FRANK AMENDOLA

STATEMENT OF ISSUES

1. No part of the delay between mistrial and retrial was attributable to the defendant.
2. Amendola was prejudiced by the delay of trial as testimony was developed by the government subsequent to October 3, 1976.
3. Were Amendola's Fifth Amendment rights violated by playing of his voice exemplar?

ARGUMENT

Amendola's main brief was filed on February 22, 1977; the appellee's brief was filed on March 23, 1977; Amendola replies to three portions of appellee's brief in this reply brief.

I. NO PART OF THE DELAY BETWEEN MISTRIAL AND RETRIAL WAS ATTRIBUTABLE TO THE DEFENDANT.

No part of the 60-day period from mistrial to retrial was attributable to Amendola. Amendola is certain the appellee, at Page 6 of its brief, does not mean to state or imply that the reason the retrial did not start within the 60-day period mandated by 18 U.S.C. §3161(e), or the District of Connecticut Revised Rule 50(b) Plan, effective July 1, 1976, or the District of Connecticut Revised Rule 50(b) Plan effective October 6, 1975 was due to "...counsel for appellant indicated a desire to start a state proceeding..."

It is not true that counsel for appellant indicated a desire to start a state court proceeding. In fact, counsel for appellant asked the trial court if he could represent to the state court that he was being held by the trial court to start U. S. v. Amendola. The trial court specifically stated "I am not holding you." (App. 16) That portion of the colloquy between the court and counsel is as follows:

"...That will be followed by U. S. versus Amendola, but I will not pick a jury this morning. I think it would be too much to pick four juries.

MR. FRECHETTE: May I have your Honor's permission

to represent to the State that you are holding me?

THE COURT: I am not holding you.

MR. FRECHETTE: If I could start, is that o.k.?

THE COURT: If you have business in State Court, go ahead and start disposing of it. We will give you some warning, because I am going to set Amendola down with Marenga and Apuzzo, and that won't be done for a couple of weeks. So I will be in touch with counsel and we will work it out."

Therefore, the entire time, from August 4, 1976 through the date of the trial, November 4, 1976, is not attributable to Amendola.

II. AMENDOLA WAS PREJUDICED BY THE DELAY OF TRIAL AS TESTIMONY WAS DEVELOPED BY THE GOVERNMENT SUBSEQUENT TO OCTOBER 3, 1976.

On Page 7 of its brief the government stated Amendola makes no claim of prejudice because of the delay. On the contrary Amendola, on Pages 19 through 21 of his brief, claims just that. Special Agent Frank Cross testified at the first trial, and specifically stated, at Pages 779 and 780 of the transcript, that he could not tie any of the tape recorded numbers to the exhibits seized at Valeriano's house. This transcript referred to is the first trial, styled U. S. v. Valeriano, Docket Nos. 76-1417, 76-1441, and the critical portion of that testimony is quoted:

"Q. All I am trying to ask you, so there is no question in anybody's mind, the basic information you gave as a result of those tapes was the tapes that we all heard?

A. That's correct.

Q. Now, by the same token, those very tapes that

we all heard, none of the information, as far as the numbers themselves go, turn up on Exhibits 11 through 26 and 57 through 63, do they?

A. Not that I recall.

Q. They don't at all, do they?

A. That's a different time period.

Q. That's right. My point is, that what we heard on the tapes, as far as the numbers go, okay?

A. The numbers being played?

Q. Yes. None of those you found reflected in Exhibits 11 through 26 and 57 through 63. What I am trying to ask you, and I am not trying to trick you with it, all of these things don't purport to be a compilation of those very numbers that we heard through those earphones, do they?

A. No, sir, they do not. However, there could be the same numbers appearing. That's why I was hesitant.

Q. Okay, so there is no question in any of our minds, these are not a compilation -- and by "these" I mean Exhibits 11 through 26 and 57 through 63 -- are not a compilation of the numbers that we all heard through the earphones, are they?

A. No, sir."

Therefore, Special Agent Cross could not tie up any of the specific tapes of Amendola with the real evidence seized at Valeriano's home. At the retrial Special Agent Holmes, on the contrary, did tie up specific conversations of January 17, 19, 20, 22, and 26, 1973 to the real evidence so seized. (Tr. 480-482) This is the telling piece of testimony which was missing from the first trial and which was present in the second trial. And, most importantly, it was developed subsequent to November 5, 1976, which is more than 90 days from the

mistrial. (App. 40-42)

Captain Raucci testified that he heard the tapes on October 22, 1976, at the Hamden Police Department (App. 39) and he thinks he heard some around September 27, 1976. (Tr. 350) Therefore, his testimony was developed long after the 60-day period, and his testimony prejudiced Amendola.

Does the testimony of Holmes and Raucci "prejudice" Amendola? Of course. Was it done as a "deliberate prosecutorial effect" to postpone the trial? It is difficult to convince Frank Amendola it was not.

III. WERE AMENDOLA'S FIFTH AMENDMENT RIGHTS VIOLATED BY PLAYING OF HIS VOICE EXEMPLAR?

Appellee, quite correctly, has stated at Page 21 of its brief that U. S. v. Dionisio, 410 U. S. 1 (1973) holds that a person's Fifth Amendment rights are not violated by being compelled to give a voice exemplar before a grand jury. Appellee then cites several cases which admit into evidence non testimonial matter. Amendola has attempted, at Pages 41 through 45 of his brief, to distinguish Dionisio; U. S. v. Wade, 388 U. S. 218; Schmerber v. California, 384 U. S. 757; Gilbert v. California, 388 U. S. 263, 292, and California v. Byers, 402 U. S. 424, 433. To understand the basis of Amendola's claim, the evidence produced at trial must be reviewed again. The government's order of proof in this case consisted of O'Connor, Security Agent for the Southern New England Telephone Company, who testified as to the location of and ownership of tapped

telephones; FBI Agent Hendricks who testified as to the installation of the taps; FBI Agent Puckett who testified that Amendola gave a voice exemplar to the grand jury, identified the voice of Amendola, supervised the playing of Amendola's voice exemplar to the jury, and played the voice exemplar at the conclusion of the tapes; FBI Agent Connolly who, during the playing of the tapes, identified the speakers; Captain Raucci who testified as to voice identification of Amendola, and the testimony of Agent Holmes who identified the numbers recorded on the tapes with the numbers seized at Valeriano's home.

Amendola is asking this court to find that his Fifth Amendment rights were violated when his voice exemplar was played before the jury in this case as there was no other evidence, when his exemplar was first played, that he committed any crime at all; the government then played one day of tape recordings in which Agent Connolly identified a voice as his; the government then replayed his voice exemplar to the jury again. Amendola was convicted by the testimony of his voice exemplar. Amendola is asking this court to adopt the rationale of Justice Fortas in Gilbert at 292, of Justice Douglas in Dionisio, at 31, of Justice Marshall in his dissent in Dionisio at 31-38, of Justice Douglas in Wade at 243 and of Justices Black and Douglas in Schmerber, 773 and 778. Further, this court is asked to distinguish Wade, Gilbert, and Byers, because the testimony was admitted without alerting the trial court to

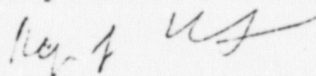
the constitutional claim.

It is respectfully submitted that the crime with which Amendola was charged was numbers and the proof of it consisted of his voice - talking - and to play his voice exemplar was testimonial. That violated his Fifth Amendment rights.

CONCLUSION

It is respectfully submitted that the conviction herein be reversed and the case remanded to the district court with direction to dismiss the indictment with prejudice.

Respectfully submitted,

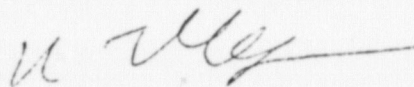


ROGER J. FRECHETTE
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FRANK AMENDOLA

Dated: New Haven, Connecticut
April 1, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 1977,
I served the foregoing Reply Brief of Defendant Frank
Amendola upon Peter Casey, Esq. 450 Main Street, Hartford,
Connecticut, by causing copies to be mailed, postage prepaid.



Roger J. Frechette